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In the

Supreme Court of the United States

October Term, 1952

NO. ~~182 MISC.~~ 648

JAMES AVERY, Petitioner

vs.

STATE OF GEORGIA, Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
I. Opinion Below	1
II. Jurisdiction	1
III. Question Presented	1
IV. Constitutional and Statutory Provisions Involved	2
V. Statement	2
VI. Argument and Citation of Authority	4
1. Certiorari denied in other like cases	4
2. Burden of proving discrimination is on petitioner	6
3. No proof of discrimination against petitioner	7
4. No valid reason shown why a writ should issue	8
VII. Conclusion	9

In the

Supreme Court of the United States

October Term, 1952

NO. 102 MISC.

JAMES AVERY, Petitioner

vs.

STATE OF GEORGIA, Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

I.

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 209 Ga. 116, 70 S.E. 2d 716.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in petitioner's brief at page 1.

III.

QUESTION PRESENTED

Whether or not a member of the Negro race in the selection of a jury before whom he is tried has been denied due process of law and equal protection of the law so as to invalidate his conviction where the jury

commissioners of Fulton County, Georgia, as one of their official procedural steps in making up a petit jury, have printed the names of White jurors on white slips of paper and the names of Negro jurors on yellow slips of paper—all of which are placed in a box from which a jury is drawn. This procedure has been followed in Fulton County for more than fifty years. More specifically the questions are:

1. Is the practice, inherently and without other facts, violative of petitioner's rights under the Fourteenth Amendment?

2. Is the practice, under the facts in this record, violative of petitioner's rights under the Fourteenth Amendment?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of law are set forth in petitioner's brief, pp. 2-7.

V.

STATEMENT

The petitioner was indicted for rape of a white woman in the Superior Court of Walker County, Georgia. Petitioner's motion for change of venue was granted, and he was tried and convicted in the Superior Court of Fulton County, Georgia. Throughout this brief the petitioner is referred to as the accused in the trial below.

On arraignment, counsel for accused filed a written challenge to the array of traverse jurors put upon him, alleging that, in making up the jury box, the

jury commissioners had placed the names of White and Negro jurors on slips of paper of different colors, the names of the White jurors being placed therein on white slips and the names of Negro jurors being placed therein on yellow slips.

This procedure of placing in the jury box the names of White jurors on white tickets and the names of Negro jurors on yellow tickets has been carried on in Fulton County, Georgia, for fifty years or longer.

In the selection of the traverse jurors put upon accused, no influence was exercised, no devise was used, no precaution was taken and no purposeful plan was resorted to in an effort to exclude negroes, according to the uncontradicted testimony of the judge who made the selection.

From the evidence it is apparent that in Georgia valid reasons exist for the procedure of placing in the jury box the names of White jurors on white tickets and the names of Negro jurors on yellow tickets:

(1) It makes readily available information which will aid the sheriff in locating and summoning individual jurors;

(2) It makes readily available information which will aid the jury commissioners in checking names in the jury box against the tax digest, in which the names of Whites and Negroes are required by statute to be listed separately, and from which the jury commissioners are required by statute to select the names placed in the jury box; and

(3) It enables the trial judge readily to determine from an inspection of the jury box itself whether or not the jury commissioners have included therein the names of both White and Negro traverse jurors.

Nevertheless, the Supreme Court of Georgia in its decision of this case has expressed disapproval of this procedure and directed that it be discontinued, but ruled that in the present case accused suffered no harm from this procedure.

A full and complete statement of the facts is contained in the report of *Avery vs. State*, 209 Ga. 116, 70 S.E. 2d 716.

VI.

ARGUMENT AND CITATION OF AUTHORITY

It is contended by counsel for petitioner that this Court should grant certiorari and review and reverse this case because the procedure adopted in selecting the traverse jurors put upon accused "aids and facilitates the possibility of discrimination" in the selection of traverse jurors. Apparently counsel conclude that under the holdings of this Court the possibility of racial discrimination is equivalent to purposeful, systematic non-inclusion because of color. This conclusion is a nonsequitur.

1. Certiorari denied in other like cases.

While respondent is aware of what this Court has said is the effect of denial of certiorari, respondent feels compelled to illustrate the action taken by this Court in identical situations.

The case of *State v. Walls*, 211 N.C. 487, 191 S.E. 232; certiorari denied 302 U.S. 635, 58 S. Ct. 18, 82 L. Ed. 494; 1 A.L.R. 2d 1307, involved a factual situation almost identical with the case at bar. In North Carolina, as in Georgia, the commissioners select names to be placed in the jury box from the tax digest, Whites and Negroes being listed therein separately. On the scrolls used in selection of grand and

petit jurors the names of *Whites were written in black ink* and the names of *Negroes were written in red ink*. The clerk of the board of county commissioners testified: " . . . if the name comes out red or black it is put on the list. *The purpose in two different colors of ink is to see who to look for. It makes it easier to look for them.*" (Italics added.) This procedure was approved by the Supreme Court of North Carolina, and certiorari was denied by this Court.

The decision in the *Walls* case some years later was reaffirmed by the Supreme Court of North Carolina in *State v. Koritz*, 227 N.C. 552, 43 S.E. 2d 77.

In the *Koritz Case*, supra, accused complained of the selection of names to be placed in the jury box by "the use of separate tax lists for Whites and Negroes." The Supreme Court of North Carolina ruled (43 S.E. 2d 77, text 81): "It is the contention of the defendants, however, that our statutes on the subject contain inherent, constitutional infirmities, in that, the jury list is taken from the names of taxpayers of the county who are of good moral character and of sufficient intelligence. . . . The present case, in its factual situation, is strikingly similar to the one presented in the case of *State v. Walls*, supra, where a like ruling was upheld, and, on appeal to the Supreme Court of the United States, the decision was left undisturbed . . ." This Court denied certiorari in the Koritz Case, 332 U.S. 678, 68 S. Ct. 80, 92 L. Ed. 354.

Since the procedure used in the selection of the traverse jurors put upon accused in this case has been practiced unchallenged in Fulton County, Georgia, for fifty years or longer by common consent, this history is a strong ally of respondent in this case. As pointed out by then Chief Judge Cardozo in *Coler v. Corn Ex-*

change Bank, 250 N.Y. 136, 164 N.E. 882 (1928), affirmed 280 U.S. 218; 50 S.Ct. 94, 74 L.Ed. 378 (1930): " 'The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. *If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to effect it.*' (*Jackson v. Rosenbaum Co.*, 260 U.S. 22, 43 S. Ct. 9, 67 L. Ed. 107)." (Italics added.)

The case at bar is not a strong case against the procedure used in the selection of traverse jurors put upon accused. It is not contended on behalf of accused, except by innuendo, that accused has been actually and in fact discriminated against in this case. The Supreme Court of Georgia, as well as the trial judge, adjudicated that accused had not been discriminated against or harmed by the "mechanical compartment of the law" used in the selection of the traverse jury put upon accused. This adjudication is supported by the evidence adduced on that issue, which evidence indubitably establishes that a fair jury, selected without regard to race, under a conscientious procedure of selection, without any purposeful non-inclusion because of color, was put on accused. But counsel for accused baldly assert that the procedure of selection of traverse jurors put upon accused contains inherent constitutional infirmities and that, for such reason alone, this case should be reviewed and reversed by this Court, though accused was not in fact harmed and though such procedure affords a mere possibility of discrimination if the jury selection officials had been dishonest.

2. **Burden of proving discrimination is on Petitioner**

Equally untenable is the contention of counsel for

accused that in this case the burden is on the State to establish "as a *mathematical fact* that discrimination is not practiced" in the selection of traverse jurors. It would be as impossible to meet such a requirement as it would be to meet a requirement of proportional representation of the races on the jury list, because it would turn matters inherently incommensurable into mere matters of mathematics.

"Moral and reasonable certainty is all that can be expected in legal investigation . . ." Ga. Code, Sec. 30-105. "Absolute certainty of any fact is not to be attained in the trial of a case" *Bone v. State*, 102 Ga. 387, 390; 30 S.E. 845. "Moral and reasonable certainty is all that can be expected in legal investigations, mathematical certainty not being required . . ." *Daniel v. State*, 61 Ga. App. 663, 664 (1); 7 S.E. 2d 204.

As pointed out by Mr. Chief Justice Stacy in the Koritz Case, supra (43 S.E. 2d 77, text 81): "Hence, as local officials are in better position than outsiders to weight the imponderables, *their determination of the matter will be upheld unless too wide of the mark or 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'.*" (Italics added.)

3. No proof of discrimination against petitioner

The jury selection plan of Fulton County, Georgia, is not ingenious, but is an ingenuous, fair and conscientious procedure of selection. The operation of this plan has not resulted in the exclusion of or discrimination against Negroes in respect to jury service, for Negroes serve frequently and regularly on both the grand jury and petit jury. Proportional representation of Negroes on the jury list, being an impossibility,

is not provided, but there is neither limitation nor non-inclusion because of color. Neither the jury selection plan itself nor the results from administrative practices of the jury selection officials are discriminatory per se. Therefore, the burden of proof to sustain the contention of discrimination or non-inclusion was on accused. In the case at bar the evidence adduced signally fails to sustain accused's contention of unlawful discrimination or purposeful non-inclusion in selection of traverse jury put upon him, and it also fails to overcome the legal presumption that the jury selection officials performed their duty fairly, without discrimination against or non-inclusion of Negroes. Cf. *Herndon v. State*, 178 Ga. 832, 174 S.E. 597; app. dismd. 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794; 1 A.L.R. 2d 1294.

Mere absence of Negroes from the particular traverse jurors put upon accused is insufficient, in and of itself, to show discrimination or non-inclusion because of race. 1 A.L.R. 2d 1314, Sec. 10.

Mere suspicion or mistrust is insufficient, in and of itself, as proof of discriminatory practices in jury selection. The presumption in favor of the proper performance by the officers of their duty in selecting a fair and impartial jury cannot be overcome by figments of the imagination or conjecture.

4. No valid reason shown why a writ should issue.

The petitioner has failed to demonstrate any reason why the writ of certiorari should be granted in this case. In division D of his petition for the writ he fails to point out a single case which would illustrate that the Georgia Supreme Court in the instant case was not in accord with the applicable decisions of this Court, and the cases to which he refers without discussion

are inapproprite to the question here presented. Counsel for respondent can find no case where this Court has granted certiorari and reversed by reason of non-inclusion of members of the Negro race from the jury except upon a showing that the discrimination was actual, systematic, or complete exclusion. In other words, petitioner has not shown that the decision below is clearly in error or that it is in conflict with any applicable decision of this Court, or finally that a weighty Federal question of paramount importance is presented for decision.

VII.
CONCLUSION

For the foregoing reason it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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